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IN THE

Supreme Court of the United States

TERM, 1947

STATE OF NEW YORK, DELAWARE et al., ... *Appellants* vs. UNITED STATES, et al., ... *Appellees*	No. 343
HON. HORACE A. HILDRETH, GOVERNOR OF MAINE, et al., ... *Appellants* vs. UNITED STATES, et al., ... *Appellees*	No. 344
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., ... *Appellants* vs. UNITED STATES, et al., ... *Appellees*	No. 345

AMICUS CURIAE BRIEF FOR THE COMMONWEALTH OF KENTUCKY, THROUGH ITS ATTORNEY GENERAL.

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INDEX

	Page
Motion for Leave to File	1-2
Brief:	
Statement of the Case	3-5
Argument:	6
I. The Commission should not be restrained in its procedure to harmonize class-rate structure with the requirements of the Federal Constitution	6
II. The contention of Appellants in the lower court stated and discussed	8-15
III. Each State has the Constitutional right to retain her natural advantages in commerce	15-20
IV. The ad interim order and supplemental order of the Commission are in harmony with the Constitution of the United States, and disclose a procedure of substituting geographical uniformity in class rate regulations in lieu of a presumed intrinsic uniformity throughout the entire territory under consideration	20-34
V. The States can not be legally deprived of their natural advantages. Hudson County Water Company v. McCarter, 209 United States, 349, 356, 357	34-35
Conclusion	36

TABLE OF CASES CITED

Pages

House Document 137 of the 78th Congress of the United States, First Session, pages 46 to 49 12

Hudson County Water Company v. McCarter, 209 U. S. 348, 356, 357; 52 L. Ed. 828, 832 16

Interstate Commerce Commission v. Chicago and Great Western Railway Co. et al., 209 U. S. 108, 122; 52 L. Ed. 705, 714 16

United States v. Illinois Central R. R. Co. et al., 263 U. S. 515, 524; 63 L. Ed. 417, 425 17

Northeastern Coal Bureau v. C & O R. R. Co. 206 ICC 445, 448 (Docket 26080) 17

C & O R. R. Co. v. United States, 296 U. S. 187, 80 L. Ed. 147 18

United States v. Illinois Central Railroad Company, et al., 263 U. S. 515, 524; 63 L. Ed. 417, 425 18

262 ICC, page 696 18

Interstate Commerce Commission v. Baltimore and Ohio Railroad Co. 145 U. S. 263, 282; 36 L. Ed. 699, 705 21

Gibbons v. Ogden, 22 U. S. (9 Wheat) 1, 224, 225; 6 L. Ed. 23, 77 23

Cooley v. Board of Wardens of Port of Philadelphia, 53 U. S. (12 Howard) 299, 319; 13 L. Ed. 996, 1005 25

Gloucester Ferry Co. v. Commonwealth of Pennsylvania, 114 U. S. 196; 29 L. Ed. 158, 162 26

Wilson v. United States, 30 Fed. Cas. 239, 243 (1 Brock, 423) 27

Papers of James Madison (by Henry D. Gilpin 28, 29

Knowlton v. Moore, 178 U. S. 41, 105, 106; 44 L. Ed. 969, 995 30

Downes v. Bidwell, 182 U. S. 244; 45 L. Ed. 1088..... 30

Flint v. Stone Tracey Co., 220 U. S. 107; 55 L. Ed. 289 30

Louisiana Public Service Commission v. Texas and New Orleans R. R. Co. 284 U. S. 125, 131; 76 L. Ed. 201, 204, 205 31

Hudson County Water Co. v. McCarter, 209 U. S. 349, 356, 357 34

Knowlton v. Moore, 178 U. S. 41, 105, 106; 44 L. Ed. 969, 995 34

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MOTION TO FILE AMICUS CURIAE BRIEF

ELDON S. DUMMIT,
Attorney General

M. B. HOLIFIELD,
Assistant Attorney General

Of Counsel,
J. E. MARKS
L. F. ORR

MAY IT PLEASE THE COURT:

Comes now the Commonwealth of Kentucky, by and through its Attorney General Eldon S. Dummit, and states that in the territory embraced within the Commonwealth a part of its rail carriers operate under official class rates, and the balance of its rail carriers operate under Southern class rates, and that by reason thereof the Commonwealth of Kentucky and its citizens have a vital interest in the controversy now under consideration in the foregoing captioned cases.

Wherefore, the Commonwealth of Kentucky moves that it be granted the privilege of filing the following AMICUS CURIAE brief herein.

ELDON S. DUMMIT,
Attorney General

M. B. HOLIFIELD,
Assistant Attorney General

Of Counsel
J. E. MARKS
L. F. ORR

IN THE

Supreme Court of the United States

..... Term, 1947

State of New York, Delaware, et al.	*Appellants*	No. 343
vs.		
United States, et al.,	*Appellees.*	
Hon. Horace A. Hildreth, Governor of Maine, et al.,	*Appellants*	No. 344
vs.		
United States, et al.,	*Appellees.*	
Atchison, Topeka & Santa Fe Railway Company, et al.,	*Appellants*	No. 345
vs.		
United States, et al.,	*Appellees.*	

AMICUS CURIAE BRIEF FOR THE COMMONWEALTH OF KENTUCKY, THROUGH ITS ATTORNEY GENERAL

May it Please the Court:

The challenged reports, findings and ad interim orders on review before this Court in the above captioned cases

grew out of an investigation designated as I. C. C. Dockets 28300 and 28310, which was commenced by the Interstate Commerce Commission, upon its own motion, on the 29th day of July, 1939. It involves interstate class rates applicable to the transportation of property by the railroads, or by water, or partly by rail and partly by water, between all points in the United States east of the Rocky Mountains.

Lengthy hearings were held in different parts of this territory, and all interested were given ample opportunity to present testimony sustaining their contentions. The Commission had before it a record of more than five thousand (5000) pages, and two hundred and thirty-three (233) statistical exhibits, when it promulgated its original and supplemental reports, findings, and ad interim orders.

This amicus curiae brief by the Commonwealth of Kentucky through its Attorney General is filed herein because the State and its citizens have a vital interest in the outcome of this litigation. Kentucky is peculiarly situated with respect to this controversy in that it is served by rail carriers, a part of which operate under class rates prescribed for official territory, and part under class rates prescribed for southern territory. Kentucky, on its borders and within its territory, has more navigable streams than any State in the Union. It makes no difference whether our rail and water carriers are operating under official or southern class rates, their operating conditions and facilities, their freight density, and the cost of maintaining their respective transportation systems, upon the whole are as favorable as those that prevail in official territory, and it is obvious that no class rate, fare, or charge, can be legally imposed upon the shippers of Kentucky that are higher than those that are permitted in official territory.

The original and supplemental reports, findings, and ad interim orders of the Interstate Commerce Commission in I. C. C. Docket No. 28300 disclose a material approach to

and an intent by the Commission ultimately to establish a uniform system of class rates, fares and charges for transportation service over the entire territory east of the Rocky Mountains, and which territory of course includes Kentucky. Such a goal has long been sought by our Commonwealth as one that is to the best interest of the carriers, as well as to the shippers of our State. It would completely remove the class rate differential on transportation between official and southern territories that constitutes an embargo against the industrialization of the territory south of the Ohio river. It would give immediate relief to those industries that exist in Kentucky and other southern states by enlarging the territory in which they can ship and sell their finished products on a plane of equality with their northern competitors.

While Kentucky recognizes that this temporary adjustment is not perfect, and while in all probability our State will suffer more from the "half-a-loaf" adjustment than any other southern State, we recognize that this temporary adjustment, although imperfect, will wipe out more unlawful differentials against the South, and will give our shippers some immediate relief while waiting for the delayed, permanent, uniform adjustment.

It is naturally anticipated that within a reasonable time the Commission will substitute a new uniform system of classifying freight for shipment in lieu of the three separate contradictory and highly discriminatory classifications that now exist in the north, south and west, and that when this is done it is reasonable to expect that the Commission will then make effective the final uniform system of class rates, fares, and charges for the entire territory, and in so doing it will remove any defective ad interim inequalities that cause prejudice or unlawful advantage to any person, locality, district, region or territory under consideration.

ARGUMENT

The Commission Should Not Be Restrained in Its Procedure to Harmonize Its Class Rate Structure with the Requirements of the Federal Constitution.

For many years the manufacturing industries in official territory have enjoyed a system of class freight rates of a general average of about 39% lower than was imposed upon the manufacturers of identical products and for identical transportation service in southern territory. This unfair differential in class freight rates enabled the manufacturer of the north to ship his products to customers in a sale territory much greater than like manufacturers in the southern states.

It is common knowledge that prior to the War Between the States that while the south contained approximately one-third of the population of the Union, it controlled slightly more than one-third of its industries. But during that unfortunate War its industry was wholly destroyed. It was several years thereafter before Southern people were financially able to rebuild their destroyed industries, and when that period arrived it was no encouragement to them or to outside investors to discover the fact that a competing industry north of the Ohio river could serve a much larger sale territory than that open to a manufacturer south of the Ohio river, not by reason of any natural advantage, but by reason of the North's lower freight rates. As a consequence of these conditions, eighty-five per cent (85%) of all manufacturing plants in Kentucky are located in counties bordering on the Ohio river, and the remaining fifteen per cent (15%) are distributed among interior counties of Kentucky which can only serve local patrons. The same unfortunate conditions prevail in the territory to the south of Kentucky. Those plants on the Ohio river in our State can ship their finished products north into official territory, and by reason of the access to lower

freight rates can successfully compete on a plane of equality with like plants in official territory. That reason, and that reason alone, accounts for their existence, location and prosperity. Manufacturing plants bring skilled labor; skilled labor brings high wages, and high wages increase the number of happy homes and the prosperity of the State where it can thrive. No Federal regulatory body has the power to legally impose on any part of the territory of the United States a regulation that would bar its industrialization.

Appellants were critical of the Southern Governors' Conference—accused those Governors of "beating the tom toms", and of seeking more favorable freight rates in order to shift industry from the north and locate it in the South. Interstate freight rates are regulated by the Federal Government, and neither Kentucky nor the other southern States demanded any lower rates than those that have heretofore been so generously granted to the North and have for so long been withheld from the South.

Kentucky is only seeking an equality of treatment in governmental regulations with her competitors of the north. This equality of treatment does not mean that the manufacturing plants north of the Ohio river shall be shifted to the south, but it does mean that the northern manufacturers' sale territory shall not be artificially escalated to a much larger marketing area, to the disadvantage of every like manufacturer of Kentucky whose products are subject to southern class rates. We are only asking that the industry in official territory be deprived of an unjust, undue artificial preference and advantage that was and is prejudicial to our welfare.

THE CONTENTION OF APPELLANTS IN THE LOWER COURT STATED AND DISCUSSED

It was the contention of the appellants in the lower Court that there was not sufficient evidence before the Commission to support their findings, and that said findings were inadequate to support the original ad interim and supplemental orders made; that in its supplemental report the Commission made *pro forma* findings; that existing class rates within official territory are less than minimum reasonable rates in violation of Sections 1(4) and 4(a) of the Interstate Commerce Act, and that neither this ultimate finding nor the Commission's order requiring a ten per cent increase in class rates for transportation within official territory is supported by preliminary findings and that present class rates fail to provide adequate compensation to carriers in official territory for their transportation service. They charge that the primary and motivating influence for the orders made was "to stimulate the movement of industry from the north to the south", and that for those reasons the orders of the Commission are arbitrary and invalid.

Without admitting the truth of any of these contentions, it is obvious that the appellant systematically ignores, and hopes that this Court will ignore, the unreasonable differential in favor of official territory, and against southern territory, existing in the class rate levels in the two territories. And here we desire to remark that it makes no difference whether that average differential is thirty per cent or thirty-nine per cent, or a percentage somewhere between the two, its application to Kentucky can not be justified. The existence of a river, such as the Ohio, between official and southern, or any other territory, does not justify a differential in freight rates. If it did, we would have many differentials in Kentucky, because within the interior of this State there are the Tennessee, Cumber-

land, Licking, Kentucky and Green rivers—all navigable for many miles and all crossed by one or more railroads. There must be a legitimate basis for a differential, and the principal one is the different cost of service in the different territories. But that legitimate justification does not exist between official territory and Kentucky, and for that matter it does not exist between official territory and the other southern states.

The head cost analyst for the Commission was and is Dr. Ford K. Edwards. In the hearing before the Commission he presented an elaborate cost study covering the entire territory under consideration, which cost study was only mildly criticised by any of the able cost analysts who were present and available to the appellants herein. Neither did the rail carriers or the appellants offer a different cost study. In the "Statement of Dr. Ford K. Edwards in Reply to the Criticism of Exhibits Introduced by Him" before the Commission, and on page 2 thereof, he admitted:

> "There can be no doubt that the costs for Kentucky are lower than the costs in the remainder of the South and the East."

Further on in this evidence occurs his statement of explanation and his table exhibiting relative costs between Kentucky and the United States, as a whole, and the remaining southern states and the east, which is as follows:

> "The figures for the United States are taken as 100 for purposes of comparison. The comparisons are based, first, on assumed loads of 25 tons and 50 tons in box cars and gondolas, respectively, and secondly, on the territorial average loading obtaining for these classes of equipment in the respective territories. This latter comparison was available only for those territories for which average loads by classes of equipment had been computed. The supporting detail appears in my Exhibit ——, Identification A, Tables I and II."

Territory	Box Cars		Gondola and Hopper Cars	
	25 Tons	Actual Load	50 Tons	Actual Load
New England (Terr. 1)	143	.....	152	.....
Eastern excl. New England and Northern Illinois (Terr. 2)	99	.....	98	.....
Eastern incl. New England (Terr. 1, 2)	101	102	101	100
Pocahontas (Terr. 5)	67	68	63	63
Eastern incl. New England and Pocahontas (Terr. 1, 2, 5)	96	.....	94	.....
Eastern incl. New England and State of Kentucky	100	.....	99	.....
Eastern incl. New England, Pocahontas, and State of Kentucky	94	.....	93	.....
Southern (Terr. 6)	96	97	99	102
State of Kentucky	76	.....	77	.....
Southern excl. State of Kentucky	101	.....	105	.....
Eastern incl. New England and Southern (Terr. 1, 2, 6)	100	.....	100	.....
Western (Terr. 11)	109	108	110	115
United States (Terr. 12)	100	100	100	100

The above table should be examined in the light of the map of Dr. Ford K. Edwards, appearing on the inside cover page of his "Railroad Freight Service Costs in the Various Rate Territories, Cost Scales by Territories and Classes of Equipment," filed before the Interstate Commerce Commission as "Exhibit #3." A photostatic copy of this map is inserted herein as a part hereof at the end of this brief, as "Appendix A" thereto, for the convenience of the Court.

This map discloses that when Dr. Edwards speaks of "Eastern," it includes the States of New York, New Jersey, Delaware, Maryland, Pennsylvania, Ohio, Indiana, Michigan, and the greater part of the State of Illinois. This is only a segment of that part of the United States that is usually spoken of as "official territory" in discussing rail rate matters. He excludes from "official territory" West Virginia, and all that part of Virginia which lies north of

the Norfolk and Western and Virginia railroad, and designates this excluded territory as "Pocahontas."

The "Pocahontas" territory embraces that part of the Chesapeake and Ohio, the Norfolk and Western and Virginia railroads lying in West Virginia, and that part of Virginia north of but including the Norfolk and Western and Virginia railroads. In this map he also designates "New England" as embracing the states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut and Rhode Island, which is likewise a part of official territory.

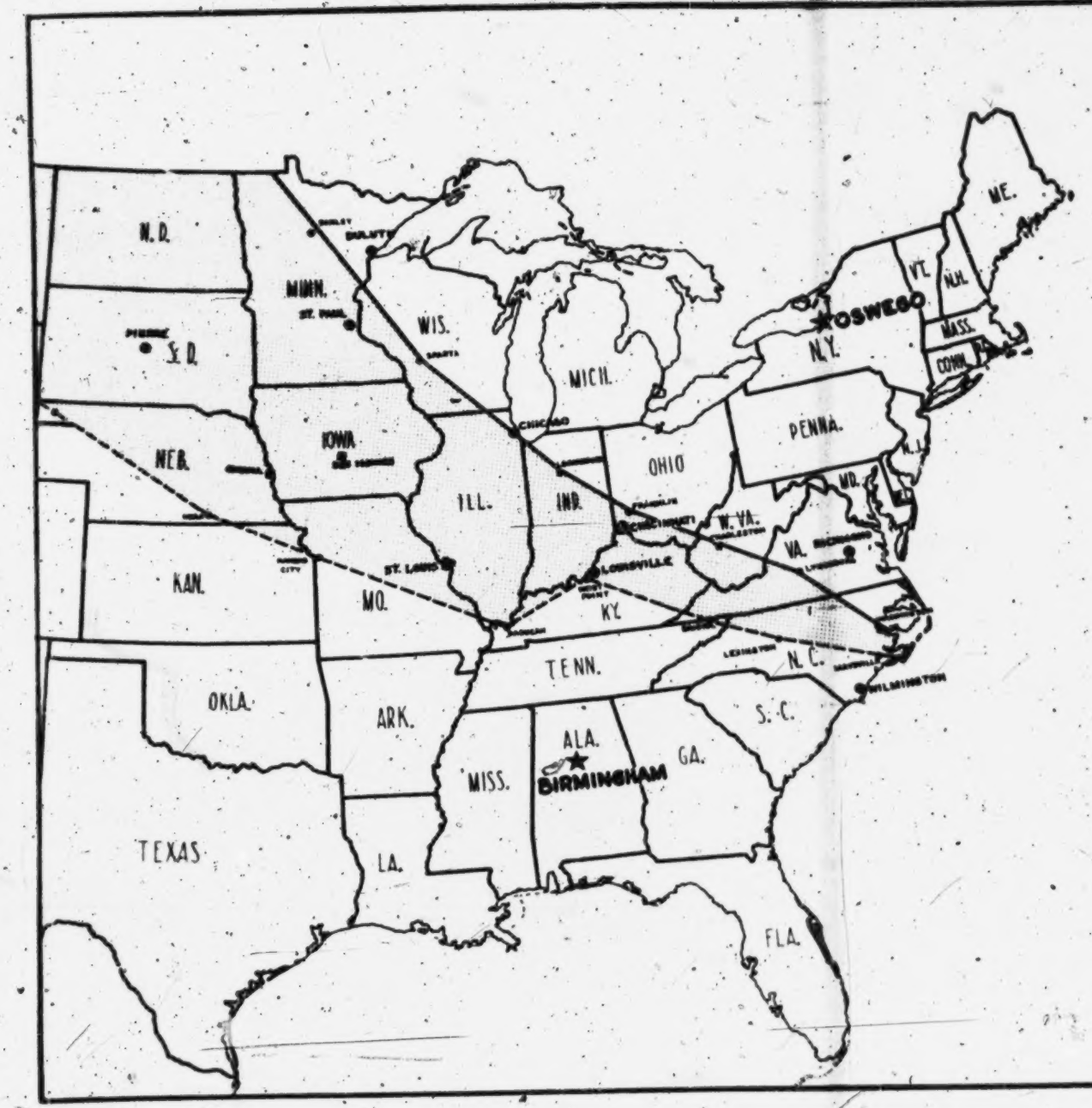
With this information in mind, we examine the last item of column 1 in the foregoing table, and discover that the average cost of operating the railroads in the United States is designated by the figures "100." But in designating the cost for "New England," as shown by column 1, it is placed at 143. "Eastern," excluding New England and northern Illinois (Terr. 2) that cost is placed at 99. "Eastern," including New England (Terr. 1 and 2), it is placed at 101. "Pocahontas" (Terr. 5) it is placed at 67.

"Eastern," including New England and Pocahontas, (Terr. 1, 2, 5) it is placed at 96. "Eastern," including New England and Kentucky, it is placed at 100. "Eastern," including New England, Pocahontas and Kentucky, it is placed at 94. "Southern" (Terr. 6) it is placed at 96. "State of Kentucky," it is placed at 76. "Southern," excluding Kentucky, it is placed at 101. "Eastern," including New England and Southern (Terr. 1, 2 and 6) it is placed at 100. "Western" (Terr. 11) it is placed at 109.

This map of each of the separate territories east of the Rocky Mountains, and the foregoing table of Dr. Edwards, disclose that the cost of operating rail carriers in Kentucky is less than any territory except that which is designated on this map as "Pocahontas," and it is less than any combination of territories that can be made without including Kentucky.

When you consider the cost of operating rail transportation systems in Kentucky as compared with other territories north, south, east and west of the Commonwealth; also, when you consider that the traffic density of Kentucky is equally as great as the density of any territory within the United States, and much higher than the average density of the northern territory which has long enjoyed the lower rates; and further, when you consider the fact that operating conditions in this State compare favorably with the operating conditions of any adjoining territory, the unlawfulness and injustice of charging the exorbitant southern class rates imposed upon a great majority of Kentucky shippers becomes startling! It is remarkable that any Federal regulatory body should, for as long a period of time as southern class rates have been maintained, remain blind to the inexcusable injustice that has been imposed upon this Commonwealth! Outside of the territory designated on Dr. Edwards' map as "Pocahontas," you can not find any territory in the United States so justly entitled to the same class rates that have been so generously given to official territory, which is designated as "Eastern" on Dr. Edwards' map, for all the many years of Federal regulation of freight rates.

The most complete demonstration of unlawful prejudice resulting to southern and western territory, and unlawful advantage granted to official territory by reason of the rail rate differential, is set forth in a communication from the chairman of the Tennessee Valley Authority, entitled "Regionalized Freight Rates Barrier to National Productiveness," which was transmitted to the Congress of the United States by a letter of date March 25, 1943, by President Franklin D. Roosevelt, and published as House Document 137 of the 78th Congress, First Session. On pages 46, to and including 49, under the subject head of "Contraction of Market Territory," the author discloses how in a shaded area on maps 3, 4 and 5, the southern or



INEQUALITY OF MARKETING OPPORTUNITY CAUSED BY REGIONALIZED CLASS-RATES

MARKETING AREAS OF MATCH MANUFACTURERS IN SOUTHERN AND OFFICIAL TERRITORIES COMPARED ON BASIS OF RATES AND DISTANCES

In competition between manufacturers in Birmingham, Alabama (Southern) and Oswego, New York (Official) for the sale of matches, the shaded area is a market in which Birmingham possesses the "natural" advantage of distance but Oswego possesses the "practical" advantage of lower freight rates.

KEY

——— EQUAL - DISTANCE LINE (APPROXIMATE) BETWEEN BIRMINGHAM AND OSWEGO.

—·—·— EQUAL - RATE LINE (APPROXIMATE) BETWEEN BIRMINGHAM AND OSWEGO.

INEQUALITY OF MARKETING OPPORTUNITY CAUSED BY REGIONALIZED CLASS-RATES

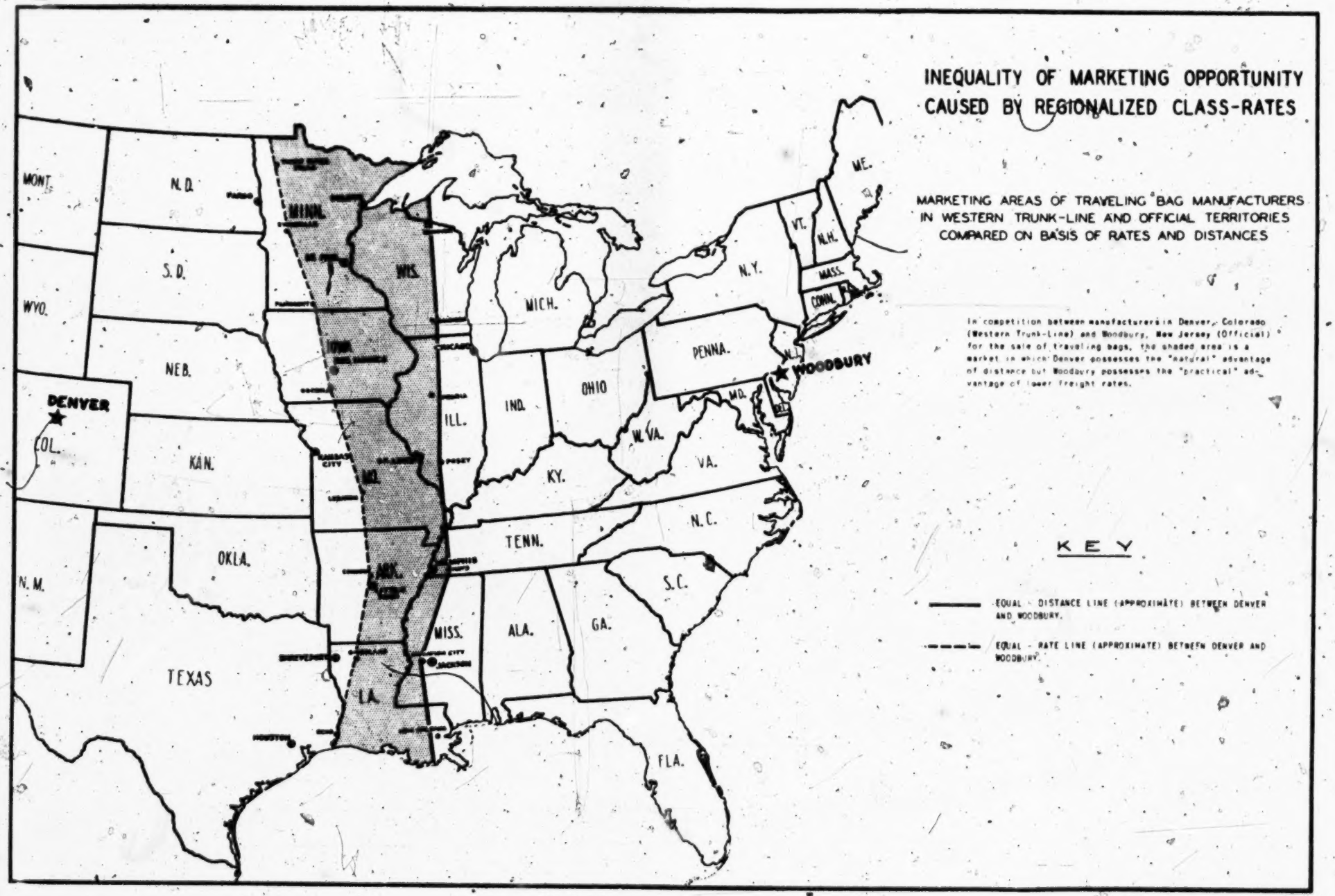
MARKETING AREAS OF SHOE MANUFACTURERS IN SOUTHWESTERN AND OFFICIAL TERRITORIES COMPARED ON BASIS OF RATES AND DISTANCES

In competition between manufacturers in Fort Worth, Texas, (Southwestern) and Boston, Massachusetts (Official) for the sale of shoes, the shaded area is a market in which Fort Worth possesses the "natural" advantage of distance but Boston possesses the "practical" advantage of lower freight rates.

KEY

EQUAL - DISTANCE LINE (APPROXIMATE) BETWEEN FORT WORTH AND BOSTON.

EQUAL - RATE LINE (APPROXIMATE) BETWEEN FORT WORTH AND BOSTON.



84579—43 (Face p. 46) FIGURE 5

more than 491,946 square miles, with a consuming population of more than 23,308,461, withdrawn from its nearest match market at Birmingham, Alabama, and granted to a far-away market at Oswego, New York, by reason of lower freight rates granted to official territory but withheld from southern territory. This immense population embraced in this shaded territory will not be able to purchase matches from the Alabama producer, unless that producer absorbs the differential in freight rates imposed on southern territory that constitutes an artificial protection to the northern producer against the southern producer. This differential is the equivalent of a tariff imposed upon the southern states for the protection of the northern states. It requires the southern producer to pay the price of that differential for the privilege of selling his product in territory that naturally belongs to him by reason of the nearness of that territory to his plant, and gives that territory to his northern competitor who can sell therein without paying the price for the privilege that is required of the southern manufacturer. Would any sensible investor construct a manufacturing plant in Birmingham, Alabama, for the production of any finished product for sale, when he is conscious of the fact that the Federal Government will deprive him of his natural advantage of distance in the sale of that product in a territory much larger than 491,946 square miles, and containing a market population that is much greater than 23,308,461 consumers of his product?

To ask this question is to answer it. It is the economic factor that has made the southern States economic Problem No. 1 of the Federal Government.

A like demonstration is furnished in other products by maps 4 and 5, disclosing a like artificial burden imposed upon producers in western territory in favor of the producers in official territory.

The discovery of these economic facts at the hearing in I. C. C. Dockets No. 28300 and 28310 was embarrassing to the Intersstate Commerce Commission, in view of the fact that it has heretofore ignored to a large degree the numerous complaints of the Southern states for the removal of the unreasonable class freight-rate differential. It accounts for the mildness in stating the economic effects resulting to the South and West by this differential in their reports, findings and orders on review before this Court. The Commission could not forget its approval of that differential by reason of their faith in the myth that "it cost more to transport property and persons in the South than in the North"—a myth that persisted through all the years of southern protest!

When the transportation cost in Kentucky is on the basis of 76 or 77, and the official territory (Eastern, New England, and Pocahontas) on a basis of 96 or 94, and then the Federal regulatory body imposes a class rate upon official territory of only 100, but impresses upon the southern territory, including a greater part of Kentucky, a class rate of an estimated average of from 130 to 139, to state it mildly, an error has been made which should be corrected, and that is what the Interstate Commerce Commission is in the process of doing in its ad interim orders on review before this Court. That body knows the paralyzing influence on an industry when undue preference is given to the manufacturers of a competitive territory against the manufacturers of another adjoining territory. It knows that the low rate imposed on official territory is not for the benefit of the carriers, but to help her shippers. The margin between cost and rates is too small to enable the transportation system to earn an adequate return upon the investment in official territory.

Each State Has The Constitutional Right To Retain Her Natural Advantages In Commerce.

The natural advantages in commerce, such as the nearness in distance to market, that belong to each State

and its citizens, can not be nullified legally, or withdrawn from them by any Federal regulation of commerce. It is the duty of the United States, in exercising its regulatory powers, to recognize and protect those natural advantages.

In the case of Hudson County Water Company v. McCarter, 209 U. S. 349, 356, 357; 52 L. Ed. 828, 832, Mr. Justice Holmes, in speaking for the United States Supreme Court upon this point, said:

> "We are of opinion, further, that the *Constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future need.* The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an anaesthetic analysis. Any analysis may be adequate. *It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will.*
>
> "The defense under the 14th Amendment is disposed of by what we have said". (Emphasis ours).

The fact that the motivating influences that caused the promulgation of the regulatory deprivation of any natural advantage was benevolent, or for the purpose of assisting in trade competition, does not legalize the discriminating regulation.

In the case of Interstate Commerce Commission v. Chicago and Great Western Railway Company, et al., 209 U. S. 108, 122; 52 L. Ed. 705, 714, Mr. Justice Brewer, in speaking for this Court upon this point, said:

> "It may be true, as contended by counsel for appellant, that even a genuine competition which results in a change of rates does not necessarily determine the question whether the rates as fixed work an undue preference or create an unlawful discrimination.

Those rates fixed may make a preference or discrimination irrespective of motive which caused the railway companies to adopt them, and yet the fact of a genuine competition does not make against the contention that the rates were intended to work an injustice". (Emphasis ours).

Again, in the United States v. Illinois Central Railway Company, et al., 263 U. S. 515, 524; 68 L. Ed. 417, 425, Mr. Justice Brandeis, in speaking for this Court, said:

> "But preference may inflict undue prejudice, although carriers' motives in granting them are honest: Interstate Commerce Commission v. Chicago, G. W. R. Co., 209 U. S. 108, 122; 52 L. Ed. 705, 713; 28 Sup. Ct. Rep. 493. Self-interest of the carrier may not override the requirements of equality in rates. It is true that the law does not attempt to equalize opportunities among localities".

When the Interstate Commerce Commission has committed an error in imposing a differential against any territory, bringing to it the burden of illegal discrimination, and has discovered that error, it certainly has the right to enter upon the process of correction as is disclosed in its reports, findings and ad interim orders on review in this case.

In their report on reargument to exceptions to the original report in the case of Northeastern Coal Bureau v. Chesapeake and Ohio Railway Company, 206 I. C. C. 445, 448 (Docket 26080) as early as February 12, 1935, the Interstate Commerce Commission said:

> "Preference, not necessarily injurious in itself, affords opportunity to gain success over and injure the other party. The act is specifically directed against undue preference and all other forms of unjust treatment of the shipping public".

An action was filed to restrain the Interstate Commerce Commission from enforcing its order based upon the above report and finding, and the Supreme Court of the United States, in the case of Chesapeake and Ohio Railroad Company, et al. v. United States of America, 296 U. S. 187; 80 L. Ed. 147, dismissed the action, thus placing its imprimatur upon the above declaration of the Commission.

In the report from which the above excerpt was taken, the Commission, is discussing Section 3. (1) Interstate Commerce Act, before that Act was amended by the 1940 Congress by adding therein the significant words "region", "district" and "territory", which words necessarily enlarged instead of restricting the power of the Commission in eliminating undue preference.

The importance of the difference of cost in maintaining the respective transportation systems in adjoining rate territories, and in determining whether the differential constitutes "undue preference", is illustrated by this Court's opinion in the case of United States v. Illinois Central Railroad Company, 263 U. S. 515, 524; 68 L. Ed. 417, 425, wherein Mr. Justice Brandeis said:

> "To bring a difference in rates within the prohibition of Section 8, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates can not be held illegal unless *it is shown that it is not justified by the cost of the respective services or by other transportation conditions*". (Emphasis ours).

The cost in Kentucky is less than in official territory. The lower cost having been established for the State, the appellants then carried the burden of showing that "other transportation conditions" justify the differential. They not only failed to meet that burden, but did not attempt to do so.

The original report by the Commission in the instant case, in 262 I. C. C., and on page 696 thereof, disclosed

the effects of this preferential differential in favor of official territory as against southern territory, when the Commission modestly stated:

> "In shipping to official territory, manufacturers in other territories not only have the disadvantage of location, but are subject to an additional burden in those instances where they must pay class rates on a much higher level than their competitors in official territory. The situation reacts to the disadvantage of manufacturers in the other territories, and to the advantage of those in official territory, *tends to restrict the growth and expansion of the manufacturers of other territories, and, to some extent, to prevent the establishment of new manufacturing plants in those territories*".

In this general conclusion and ultimate finding from the nature and scope of the evidence heard in the many hearings in the instant case, the Commission has the basis for the ad interim order to increase the rail class rates ten per cent (10%) in official territory. Congress certainly had a purpose in adding the words "region", "district" and "territory" to Section 3 (1) of the Interstate Commerce Act by the 1940 Amendment, and in those findings, and in the ad interim order, the Commission made a justifiable response to the Congressional mandate, for it is clear that Section 3 (1) supra must be read *in para materia* with Section 15 (1) of the Interstate Commerce Act as set forth in the 1940 Amendment, which, in part, provides as follows:

> "Whenever, after full hearing, * * * under an order for an investigation and hearing made by the Commission on its own initiative, with any extension of any pending complaint, or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever, demanded, charged, or collected, by any common carrier, or carriers, subject to this Chapter, for the transportation of person or property as defined in the

first section of this chapter, * * * is or will be unjust, or unreasonable, or unjustly discriminatory, or unduly preferential, or prejudicial, or otherwise in violation of any of the provisions of this Chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable, individual or joint rate, fare, or charge, or rates, fares or charges to be thereafter observed in such cases or with maximum or minimum, or maximum and minimum to be charged, and what individual or joint classification, regulation or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier, or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter demand or collect any rate, fare, or charge for such transportation other than the rate, fare or charge so prescribed or in excess of the maximum or less than the minimum so prescribed as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed".

When these two sections are read together, there can be no question but that the Commission had the right and duty to raise the class rates in official territory ten per cent (10%) above the existing rates.

The Ad Interim Order and Supplemental Order of the Commission Are in Harmony with the Constitution of the United States, and Disclose a Procedure of Substituting Geographical Uniformity in Class Freight Rate Regulations in Lieu of a Presumed Intrinsic Uniformity Throughout the Entire Territory Under Consideration.

In no part of this brief have we intended, directly or indirectly, to offensively criticise any act of the Interstate Commerce Commission with respect to the differential in favor of official territory, and against southern territory.

We have no doubt of its integrity. We are sure that in imposing the differentials of which we complain they were not only misled by the erroneous consideration of factors that were foreign to the legal problem under consideration, but were also misled by the history of the Transportation Act under which they acted, and the meaning of the construction placed upon that Act by this Court in simply construing same and not passing upon its validity.

We are conscious of the fact that our Interstate Commerce Act uses the phrases "undue advantage", "undue preference", and "undue prejudice". These phrases crept into the Act because it was modeled from the English Transportation Act of 1854.

In the case of Interstate Commerce Commission v. Baltimore and Ohio Railroad Company, 145 U. S. 263, 282; 36 L. Ed. 699, 705, Mr. Justice Brown, in speaking for the Supreme Court of the United States, said:

> "The English Traffic Act of 1854 contains a clause similar to section 3 of the Interstate Commerce Act, that 'no company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.'"

He then quoted from three English cases construing this English Statute from which our Interstate Commerce Act was modeled, and on page 284 of the United States Report, and page 706 of the Law Edition, he remarked:

> "These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the Act, or would be open to the charge of unjust discrimination. *But so far as relates to the*

question of 'undue preference', it may be presumed that Congress, in adopting the language of the English Act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute". (Emphasis ours).

The Court had before it the question of a construction of the act and not a question as to its constitutional validity. The Court sought congressional intent, and when it discovered that our Interstate Commerce Act was modeled after the English Act, and that the English courts had construed the meaning of those phrases before Congress had incorporated them into our Interstate Commerce Act, they correctly concluded that it was the congressional intent to adopt the construction of these phrases as construed by the English courts. For more than fifty years this construction has been followed by our courts and by the Interstate Commerce Commission and the Commissions of the several states, but the constitutional validity of the undue advantage, preference, and prejudice phrases have not been challenged to this hour. This error of Congress has misled the State and Federal commissions through all the years.

The English courts construed the English act in harmony with the so-called English Constitution, which is a flexible Constitution. Anything that the English Parliament enacts is constitutional in England. On the other hand, we have a written Constitution embracing mandatory directions and positive prohibitions. It is the last word of the people, who are the sovereigns. It was not intended as a flexible, but as a rigid Constitution. Its directions and prohibitions must be obeyed. It is the standard by which every Congressional Act, and many of our State acts, must be measured as to their validity. When there is a doubt as to the meaning of its terms, we study the historical background out of which that instrument was promulgated. That background can always

guide us to the correct construction of any doubtful provision. This is true as to the construction of provisions with respect to dealing with foreign and interstate commerce as it is to other provisions in that instrument. We do not have to paint that background. That picture has been drawn authoritatively by Mr. Justice Johnson in his concurring opinion to the opinion of Mr. Chief Justice Marshall in the leading case of Gibbons v. Ogden, 22 U. S. (9 Wheat) 1, 224, 225; 6 L. Ed. 23, 77, when he said:

> "As early as 1778, the subject has been pressed upon the attention of Congress, by a memorial from the State of New Jersey; and in 1781, we find a resolution presented to that body, by one of his day, affirming that '*it is indispensably necessary that the United States, in Congress assembled, should be vested with a right of superintending the commercial regulations of every State, that none may take place that shall be partial or contrary to the common interests*'. The resolution of Virginia, appointing her commissioners, to meet commissioners from other states, expresses their purpose to be, '*to take into consideration the trade of the United States, to consider how far an uniform system, in their commercial regulations, may be necessary to their common interests and their permanent harmony*. And Mr. Madison's resolution, which led to that measure, is introduced by a preamble entirely explicit to this point. 'Whereas, The relative situation of the United States has been found, on trial, *to require uniformity in their commercial regulations, as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States, for preventing animosities, which cannot fail to arise among the several states, from the interference of partial and separate regulations, &c. Therefore resolved &c!*"
>
> "The history of the times will, therefore, sustain the opinion that the *grant of power over commerce, if intended to be commensurate with the evils existing, and the purpose of remedying those evils, could be only*

commensurate with the power of the states over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people, when the grant was made.

"There was not a state in the Union in which there did not, at that time, exist a variety of commercial regulations, concerning which it is too much to suppose that the whole ground covered by those regulations was immediately assumed by actual legislation, under the authority of the Union. *But where was the existing Statute on this subject. that a State attempted to execute? Or by what State was it ever thought necessary to repeal those statutes? By common consent those laws dropped lifeless from their statute books, for want of the sustaining power that had been relinquished to Congress".* (Emphasis ours).

Selfish revenue and navigation acts by the separate states were obstructing commerce and creating a hatred and animosity between the citizens of the different states, and in the adoption of the Federal Constitution the committee that was dealing with the subjects of revenue, navigation and commerce offered at the completion of the provisions two amendments, one for uniformity and one for no preference. Out of these two amendments there was finally evolved the uniformity clause as to revenue in section 8, and the no-preference clause as to revenue and commerce in section 9 of Article 1. With these two amendments secured, the jealousy and selfishness of the States as to commerce and revenue seemed to have vanished from the Constitutional Convention, and without hesitation they granted to the Federal Congress the power to regulate commerce with foreign powers, and between the States and Indian tribes. It would not have been wise for the separate states to grant this absolute power to regulate commerce between the states without imposing upon Congress the uniformity and no-preference restrictions that bar it from regulating revenue and commerce so as to exploit one section of our nation to the profit of another at the demand of

a sectional majority. To eliminate jealousy and fear of this type of sectional legislation for favored states, a requirement for geographical uniformity and a prohibition against *any preference* in revenue and commercial regulations was absolutely necessary. That is what the Convention intended, and that is the way those sections have been so uniformly construed throughout the years.

It is interesting to note that our Constitutional fathers were too wise to use any qualifying adjectives, such as "undue", with the word "preference". They did not open that door. They said "no preference" and meant exactly what they said. Every time Congress has departed from the Constitutionally adopted public policy of "no preference", they have opened the door for controversy and encouraged friction between the States. When all preference is banished, these rivals in commerce will cease their efforts to obtain any type of preference.

One of the first cases that came before the Supreme Court that required a construction of commercial powers and their restriction was the Pilot Act of one of the States, and Mr. Justice Curtis, in construing those powers for the Court, and in laying down a rule by which to determine the commercial activities that were subject to Congressional legislation, in the case of Cooley v. Board of Wardens of the Port of Philadelphia, et al., 53 U. S. (12 Howard) 299, 319, 13 L. Ed. 996, 1005, said:

> "Whatever subjects of this power are in their nature national, or *admit only of one uniform system, or plan of regulation*, may justly be said to be of such a nature as to require exclusive legislation by Congress".

If the subject of the legislation was national in scope or required uniformity of regulation, Congress possessed the exclusive power to legislate upon that subject; but if the subject was of local significance only, then the legislature of the State has legislative jurisdiction of the local

situation. But where Congress is granted power to regulate, no Constitutional father dreamed that it had been granted power to do other than to provide for one uniform system, or plan of regulation for the whole territory of the United States. They did not expect or intend that the territory of this nation, in matters of revenue or commerce, to be divided into different segments, and each segment or zone given a different type of regulation. No one believed that power had been given Congress to create the friction between States that they were trying to eliminate.

In the case of Gloucester Ferry Co. v. Commonwealth of Pennsylvania, 114 U. S. 196, 204, 29 L. Ed. 158, 162, Mr. Justice Field, in dealing with the same proposition, said:

> *"And it needs no argument to show that commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation.* Congress alone therefore, can deal with such transportation; *its non-action is a declaration that it shall remain free from burdens imposed by state legislation.* Otherwise there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products and against those of other states. *It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the states was vested in Congress."* (Emphasis ours).

The last two opinions disclose that the powers granted to Congress with respect to commerce were limited by the uniformity and no preference clauses of sections 8 and 9 of Article 1. Another significant reason as to why every interstate rate for the transportation of persons or property should be uniform throughout the United States, and without any preference for any territory not based upon necessary cost and a reasonable income upon the transpor-

tation investment, is the fact that commerce as dealt with in the Constitution was inseparable from navigation.

In the year 1787, when the Constitutional Convention closed, there was not a foot of railroad in the world. There could be no occasion for rate zones or territories with different rate levels where all commodities as a general proposition were transported upon the water. That the Convention dealt with commerce as being inseparable from navigation is disclosed in the definition of the word "commerce" by Mr. Chief Justice Marshall in his opinion in the case of Wilson v. United States, 30 Fed. Cas. 239, 243 (1 Brock 423), wherein he said:

> "From the adoption of the Constitution, till this time, the universal sense of America has been, *that the word 'commerce', as used in that instrument, is to be considered a generic term, comprehending navigation, or, that a control over navigation is necessarily incidental to the power to regulate commerce.*" (Emphasis ours.)

The Constitution never changes except by amendment, but its provisions are applicable to the new conditions that arise within the purview of those provisions. But their applications to new conditions are with the same limitations and restrictions that are applicable to the original conditions. The provisions of uniformity and no-preference applicable to water transportation are now applicable to rail transportation. Those provisions applicable to the ports of different states are now applicable to the rail gateways of those States.

But the question may be asked—did not the Constitution grant to Congress the power to "establish post offices and post roads?" The construction placed upon the words "to establish * * * post roads" by both Congress and the Federal Judiciary is that the power granted was to select the mail routes over the roads established, maintained and operated by the authority of the states. When this con-

struction was first discovered by us, we questioned its reasonableness. Investigation disclosed that an effort to regulate transportation by stage coaches was denied by the Federal Constitutional Convention; that an effort to create a cabinet officer, with power to open and maintain public roads and canals, was also denied; and while authority was granted to Congress to procure real estate upon which to locate the Nation's Capitol, its forts, magazines, arsenals, dockyards and other needful buildings, no power is directly or indirectly granted to procure real estate to establish or maintain public roads or canals.

An illuminating bit of history in this connection is found in Volume III, page 1576, of "The Papers of James Madison," by Henry D. Gilpin, published at Mobile by Allston Mygatt in 1842 (see House Document 398, 69th Congress, 1st Session, pp. 724-5), where it is stated that the following proceedings occurred on Friday, September 14, 1787, in the Federal Constitutional Convention:

> "DOCTOR FRANKLIN moved to add, after the words, 'postroads,' Article 1, Sect. 8, a power 'to provide for cutting canals where deemed necessary'.
>
> "MR. WILSON seconded the motion.
>
> "MR. SHERMAN objected. The expense in such cases will fall on the United States, and the benefit accrue to the places where the canals may be cut.
>
> "MR. WILSON. Instead of being an expense to the United States, they may be made a source of revenue.
>
> "MR. MADISON suggested an enlargement of the motion, into a power 'to grant charters of incorporation where the interest of the United States might require, and the legislative provisions of individual states may be incompetent.' His primary object was, however, to secure an easy communication between the States, which the free intercourse now to be opened seemed to call for. *The political obstacles being re-*

moved, a removal of the natural ones as far as possible ought to follow.

"MR. RANDOLPH seconded the proposition.

"MR. KING thought the power unnecessary.

"MR. WILSON. It is necessary to prevent a State from obstructing the general welfare.

"MR. KING. The States will be prejudiced and divided into parties by it. In Philadelphia and New York it will be referred to the establishment of a bank, which has been a subject of contention in those cities. In other places it will be referred to mercantile monopolies.

"MR. WILSON mentioned the importance of facilitating by canals the communication with the Western settlements. As to banks, he did not think with Mr. King that the power in that point of view would excite the prejudices and parties apprehended. As to mercantile monopolies, they are already included in the power to regulate trade.

"COLONEL MASON was for limiting the power to the single case of canals. He was afraid of monopolies of every sort, which he did not think were by any means already implied by the Constitution, as supposed by Mr. Wilson.

"The motion being so modified as to admit a distinct question specifying and limited to the case of canals.

"Pennsylvania, Virginia, Georgia, aye,—3; New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Maryland, North Carlina, South Carolina, no—8."

The political barriers between the states were removed by the adoption of those provisions in the Federal Constitution dealing with the privileges and immunities of citizenship, revenue and interstate commerce; but by a vote of eight states against three, the Convention refused to remove the natural barriers in interstate commerce. The states wanted to retain their natural advantages, and they

could not do this by granting to Congress the power to remove their natural disadvantages. If Congress cannot legally remove those disadvantages, the Commission (its instrument) can not do so.

These authorities and facts drive us to the conclusion that under the uniformity and no-preference clauses of the Federal Constitution, all regulations of commerce must be uniform throughout the United States. Those regulations deal with political and not natural barriers. This raises the question, what kind of uniformity? The answer to this question has been authoritatively given by this Court in its opinion in the case of Knowlton v. Moore, 178 U. S. 41, 105, 106, 44 L. Ed. 696, 995. Mr. Justice White in this opinion recites every step taken by the Convention in adding the uniformity and no-preference clauses to the Federal Constitution, and then states the conclusion of the Court as follows:

> "Thus it came to pass that although the provisions as to preference between ports and that regarding uniformity of duties, imposts, and excises were one in purpose, one in their adoption, they became separated only in arranging the Constitution for the purpose of style. The first now stands in the Constitution as a part of the sixth clause of section 9 of article 1, and the other is a part of the first clause of section 8 of article 1. By the result, then, of an analysis of the history of the adoption of the Constitution *it becomes plain that the words 'uniform throughout the United States' do not signify an intrinsic but simply a geographical uniformity.*"

This opinion on this point has been quoted with approval by the Supreme Court in Downes v. Bidwell, 182 U. S. 244, 45 L. Ed. 1088, Flint v. Stone Tracey Co., 220 U. S. 107, 55 L. Ed. 389, and other cases. In our research we have been unable to find any opinion that reverses or

modifies the conclusions reached in the above excerpt from Knowlton v. Moore.

If you ask us about the opinion of the Supreme Court in the case of Louisiana Public Service Commission v. Texas & N. O. R. Co., 284 U. S. 125, 131, 76 L. Ed. 201, 204, 205, our reply is that under the facts and the issues raised in that case, clause 6, section 9, of Article 1 should not have been invoked. The line haul rate for Texas and Louisiana was the same, mile for mile. In Texas the carrier rendered only a rail transportation service. In Louisiana it not only rendered a rail transportation service, but also a ferriage service. The court said: "No rate specifically applies to the ferriage across the river." The rail service was a separate, distinct service from that of the ferriage service. The linehaul rate only applied to transportation on rails, but the rail carrier performed an additional, separate, distinct service—that of ferrying the commodities across the Mississippi River. For this latter service the Commission permitted the carrier to charge 8 cents per ton, not as an increase of compensation for rail transportation, but for ferriage service in addition to the rail transportation. This did not create a discrimination in rail transportation. It could not be termed a discrimination between the ports of Louisiana and the ports of Texas. It was only a charge for actual services rendered. To constitute a discrimination between one port and another port, there would have to be a higher rate at one port for the identical service for which a lower rate was charged at a different port. No such facts were presented to this Commission or to the court in that case. Consequently, clause 6, section 9, of Article I, should not have been invoked and could not have applied, and the comments of the court in construing that clause are *obiter dictum*. There was no intention to overrule Knowlton v. Moore. In fact, an examination of the cases discussed in the briefs in the statement of this case by the

court discloses the fact that neither Knowlton v. Moore, Downes v. Bidwell, Flint v. Stone Tracey Co., nor any other case approving Knowlton v. Moore, was referred to by either the appellant or appellees. The court's remarks disclose that it did not seriously consider clause 6, section 9, of Article I, because it carelessly used language disclosing that it did not in that opinion discriminate between the difference in the facilities of commerce and the regulation of commerce. The construction of lighthouses and buildings for the accommodation of commodities in ports, and the construction of piers for the safety of the ships, does not constitute a regulation of commerce—they are the furnishing of facilities to accommodate those engaged in commerce, and with the permission of the State and Federal government can be furnished by private individuals. If it had been the intention of the Court to overrule so important a construction of clause 6, section 9, of Article 1, as was promulgated in the opinion of Knowlton v. Moore, this Court would have said so. When you admit, as you are forced to do, that geographic uniformity is applicable to regulations of commerce as it has been applied repeatedly for over one hundred and fifty years to the regulation of revenue, and when you permit a rate under regulation of commerce to prevail in one section of the country that is lower than a like rate in another section of the country where the cost of transportation is the same, the discrimination is unlawful and should be removed. Under the testimony of L. F. Orr before the Commission, Kentucky has as favorable rate density as the eastern States, or official territory. The transportation services cost no more in Kentucky than they do in the States north of and east and northeast of this Commonwealth.

If you should ask us about the opinion in the case of *Armour Packing Co.* v. *United States*, 209 U. S. 56, 60, 61,

79, 80, our answer is that there was no justification for invoking clauses (5) or (6) of section 9, Article 1, of the Federal Constitution, as a defense to the prosecution in that case. The Armour Packing Company had been indicted and convicted for obtaining from the Chicago, Burlington and Quincy Railway Co. an unlawful concession of 12 cents per 100 pounds from the published and filed rate on the portion of the route between the Mississippi river and New York for transportation upon a shipment made August 17, 1905, for carriage by rail of certain packing house products from Kansas City, Kansas, to New York, for export, in violation of the so-called Elkins Act of February, 1903, Chapter 708, 32 Statutes 847.

Under the provisions of Clause (3) of section 8, Article I of the Federal Constitution, Congress had the power to prohibit any shipper from procuring from any rail carrier the transportation of any commodity at a less rate than the one provided in the published tariffs for that commodity. The so-called Elkins Act levies no export or other tax on property transported by rail or other carriers, or owned by any person. The appellant did not, and could not, point out wherein the so-called Elkins Act discriminated between the New York port or any other port, whether served by rail or water transportation. If such imaginary competitive port was served by water transportation, the power to deprive the states of their natural advantages had been denied to the Federal Congress by the proceedings of the Federal Constitutional Convention, of date Friday, February 14, 1787, hereinbefore mentioned. Neither the Federal Congress nor its instrumentality, the Interstate Commerce Commission, has been endued with power to deprive a port of any State of such natural advantages as is brought to such a port by inland water transportation under a regulation imposed on rail transportation or otherwise. It was this lack of power the Court referred to in denying appellant's contention as

to clause (6) of section 9, supra, when on page 80 of its opinion it said:

> It may be true that the regulation of interstate commerce by rail has the effect to give an advantage to commerce wholly by water and to ports which can be reached by means of inland navigation, *but these are natural advantages and not created by statutory law.*" (Emphasis ours.)

The States Can Not Be Legally Deprived of Their Natural Advantages. See Hudson Co. Water Co. v. McCarter, 209 U. S. 349, 356, 357.

The regulation complained of by appellant prohibiting any shipper from securing a less rate of transportation from a rail carrier than was imposed on other shippers under published and filed tariffs was geographically uniform throughout the United States, as required by clause (6), section 9, Article 1, when read in *pora materia* with clause (1) of section 8, Article I of the Federal Constitution, as construed by the opinion of the Supreme Court in the case of Knowlton v. Moore, 178 U. S. 41. The so-called Elkins Act met the constitutional standard in that it regulated rail transportation under clause (3), section 8, Article 1, by prohibiting the granting or procuring of advantages in rail rates without depriving any state, or port of any state, of any natural advantages, and with the limitation of being uniform geographically throughout the United States, as required by clause (6), section 9, Article I, and in tha tit did not impose any export tax on either the property transported, or the activity of transportation, as prohibited by clause (5) of the last mentioned section. Hence, the Court correctly said:

> "The fact that regulation, within the acknowledged power of Congress to enact may affect the ports of one State more than those of another, can not be construed as a violation of this constitutional provision."

The Court made that declaration because Congress in prescribing the regulation in controversy had exercised its power within the limits imposed upon it by the Federal Constitution, but that court could not correctly make that declaration with respect to a ruling of the Interstate Commerce Commission that disregards the limitations of geographical uniformity by imposing a class freight rate upon southern territory 39 per cent higher than is imposed upon official territory, when the cost of transportation in the two territories is equal. And the last quoted excerpt was not intended to, and does not, justify the injustice imposed upon the South by this unreasonable differential in favor of official territory, nor in justification of those who devise factors upon which to base differentials not required by the Fifth Amendment to the Federal Constitution.

CONCLUSION

Under the foregoing facts, reasons, illustrations and authorities, Kentucky is entitled to the same class freight rates accorded to official territory.

The evidence before the Commission authorizes and supports its findings, and those findings are amply broad upon which to base the ad interim order and supplemental order challenged herein. Those orders disclose a determination on the part of the Commission ultimately to establish uniform class rates throughout the entire territory under consideration.

This will harmonize our class rate structure with our Federal Constitution, and grant to every part of our Nation an equal opportunity to industrialize and to develop our natural advantages.

This procedure can harm no person, natural or artificial, and no community. Consequently, we confidently expect an affirmance of the judgment of the lower Court.

Rsepectfully submitted.

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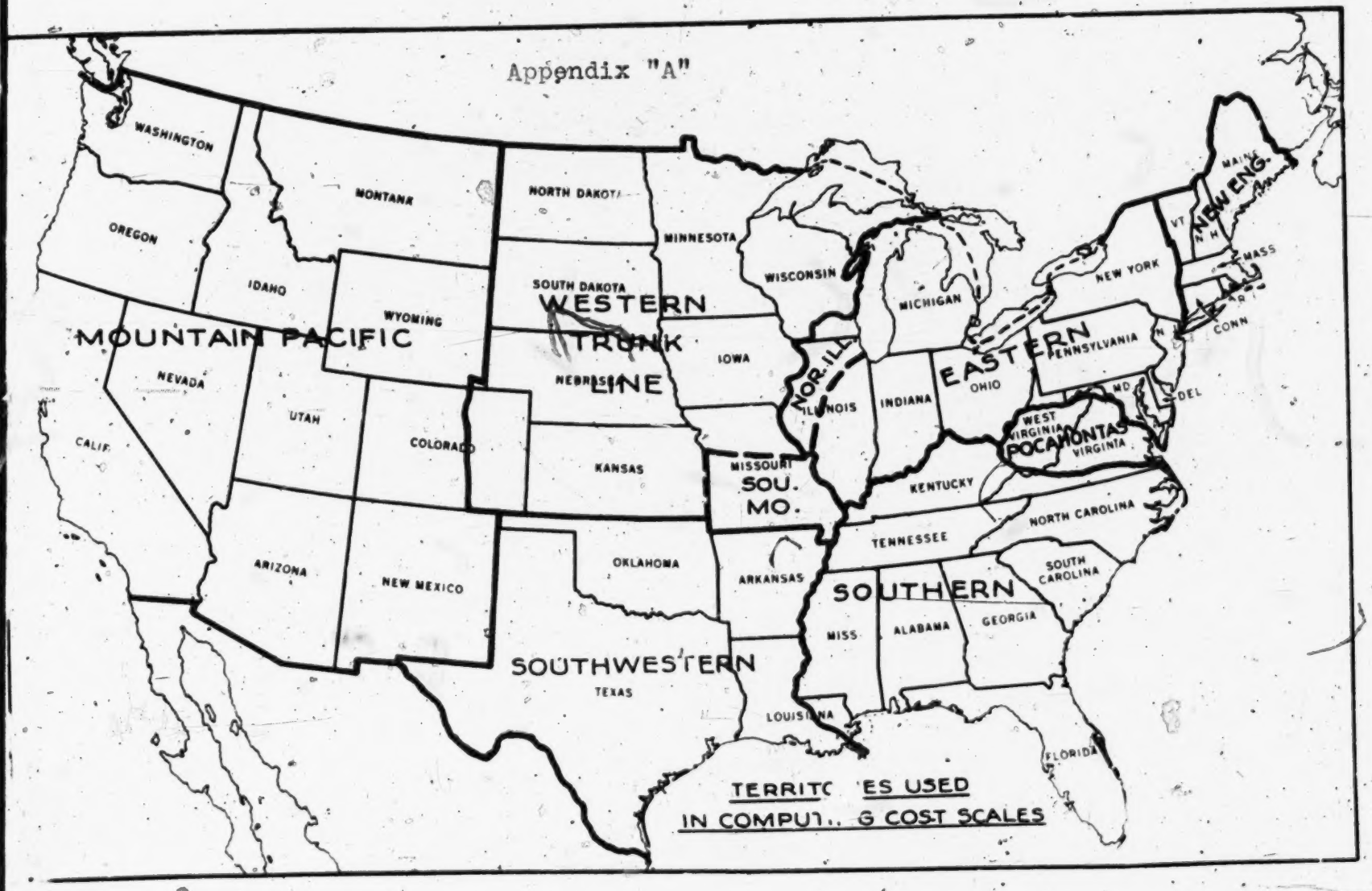
Appendix "A"



TERRITORIES USED
IN COMPUTING COST SCALES